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No. 86-1900

In the Supreme Court of the United States

OCTOBER TERM, 1987

LEONARD PELTIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there is a reasonable probability that the outcome of this case would have been altered by certain newly discovered evidence that the government failed to disclose to petitioner prior to trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 800 F.2d 772. The prior opinions of the court of appeals are reported at 731 F.2d 550 and 585 F.2d 314. The opinion of the district court (Pet. App. A32-A79) is reported at 609 F. Supp. 1143.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1986. A petition for rehearing was denied on December 30, 1986 (Pet. App. A29), and a motion for reconsideration of that order was denied on March 23, 1987 (Pet. App. A30-A31). On March 25, 1987, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including May 29, 1987 (Pet. App. A81), and the petition was filed on May 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on two counts of first degree murder in connection with the killing of two FBI agents on the Pine Ridge Indian Reservation, in violation of 18 U.S.C. (& Supp. III) 1111 and 1114. He was sentenced to two consecutive terms of life imprisonment.[1]

1. The evidence adduced at petitioner's trial showed that petitioner, who was a member of the American Indian Movement (AIM), was visiting the Pine Ridge Indian Reservation in June 1975 in connection with a political struggle over tribal government. Petitioner, together with other AIM members, stayed in an encampment within the reservation that was known as "Tent City." *United States* v. *Peltier,* 585 F.2d 314, 318 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

Special Agents Jack Coler and Ronald Williams of the Federal Bureau of Investigation also were present on the Pine Ridge Indian Reservation in June 1975; on June 25 and 26, they were attempting to locate four individuals who had been charged with armed robbery and assault with a deadly weapon. Shortly before noon on June 26, the agents—who were riding in separate cars—followed a van carrying three persons; they believed that one of the four suspects was riding in the van. The van entered a compound on the reservation located approximately one-quarter mile from Tent City; it stopped at a fork in the road leading to Tent City. The agents stopped at the bottom of a hill some distance away from the van. The occupants of the van then opened fire on the two agents and "[o]ther AIM members * * * thereafter joined in the shooting." *United States* v. *Peltier,* 585 F.2d at 318.

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[1] Robert Eugene Robideau, Darrell Dean Butler, and James Theodore Eagle also were charged in connection with these offenses. Robideau and Butler were tried and acquitted in a separate proceeding; the government dismissed the charges against Eagle.

The court of appeals observed that "[t]he agents took heavy fire. Over 125 bullet holes were found in their cars. In contrast, only five shell casings attributable to the agents' guns were ever found at the scene" (*United States* v. *Peltier,* 585 F.2d at 318). Both agents were wounded by bullets fired from a distance. Coler was struck in the right arm by a bullet that traveled through the trunk of the car; "[t]he force of the bullet almost took his arm off, rendering him completely disabled and causing him to lose blood rapidly" (*ibid.*). Williams was shot in the left shoulder; the bullet traveled into his side. These wounds were not fatal, however. The agents were killed by shots from a high velocity, small caliber weapon fired into their heads at point blank range. *Ibid.*

The court below found that "[t]he evidence clearly shows that [petitioner] participated in the shoot-out that resulted in the wounding of the two FBI agents" (Pet. App. A11). Petitioner was one of the occupants of the van that the two FBI agents had followed. The evidence showed that petitioner had reason to believe that the agents were looking for him because there was an outstanding warrant for his arrest on an attempted murder charge (*United States* v. *Peltier,* 585 F.2d at 319). Petitioner "was aware of the outstanding arrest warrant * * * and knew that if he were taken into custody by law enforcement officials, he would be returned * * * to stand trial" (*id.* at 321). One of the AIM members who participated in the shooting said that "after both sides had been shooting at one another from a distance, and at least one of the agents had been wounded, he saw [petitioner and two other individuals] standing down at the agents' cars. [Petitioner] at the time was holding an AR-15" rifle (*id.* at 319).

Petitioner and other participants in the shooting fled to the Rosebud Indian Reservation;[2] after a short stay, they

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[2] A search at the Rosebud Reservation incident to an arrest in an

departed separately. Three of the participants in the shooting were subsequently driving on the Kansas Turnpike near Wichita when their car exploded. Police recovered a large number of weapons and explosives from the car, including an AR-15 rifle and Agent Coler's rifle. *United States* v. *Peltier,* 585 F.2d at 325-326.

In November 1985, two vehicles—a motor home and a station wagon—were stopped by Oregon police. Petitioner was one of the occupants of the motor home, but he fled the scene, turning to fire on one of the police officers as he departed. *United States* v. *Peltier,* 585 F.2d at 320. Upon searching the mobile home, the officers discovered Agent Coler's revolver in a paper bag that bore petitioner's thumbprint; several shells fired from the gun were found in the station wagon. *Id.* at 322.[3] Petitioner eventually was apprehended in Canada on February 7, 1976 (*id.* at 327).

The autopsies performed on the murdered agents indicated that the shots that killed the agents were fired from "a high velocity, small caliber weapon" (*United States* v. *Peltier,* 585 F.2d at 319). The court of appeals observed that the AR-15 carried by petitioner on the day of the shooting was "the highest velocity weapon fired that day" (*ibid.* (footnote omitted)).[4] No other person was seen with an AR-15 on the day of the shooting, and petitioner "carried his AR-15 out with him when he and the other [shooting] participants" escaped to the Rosebud Reservation (*ibid.*). Three of petitioner's colleagues placed an AR-15 into their car before leaving the Rosebud Reserva-

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unrelated case turned up Agent Williams' revolver, six spent cartridges from the revolver, six spent cartridges from Agent Coler's revolver, and other weapons linked to the Pine Ridge shootings. *United States* v. *Peltier,* 585 F.2d at 327.

[3] A variety of other weapons, including hand grenades, also were found in these vehicles. *United States* v. *Peltier,* 585 F.2d at 322.

[4] The AR-15 is the civilian counterpart of the M-16. *United States* v. *Peltier,* 585 F.2d at 319.

tion; that gun was the one recovered when the car exploded on the Kansas Turnpike (*ibid.*). (That AR-15 has come to be known as the "Wichita AR-15" (Pet. App. A2).)

The Wichita AR-15 was damaged in the car explosion and could not be fired. An FBI ballistics expert, however, was able to remove the gun's bolt, place it in another AR-15, and test fire the replacement AR-15. The court of appeals summarized his testimony as follows:

> The expert testified that a .223 cartridge casing found in the trunk of Coler's car had been loaded into and extracted from the AR-15. He also testified that a .22 caliber copper bullet jacket found in the ground underneath the bodies of Coler and Williams had rifling impressions consistent with the rifling of the barrel of an AR-15.

United States v. *Peltier,* 585 F.2d at 320. There was other evidence at trial relating to the ammunition components found at the site of the killings. An October 31, 1975, FBI laboratory report that was admitted into evidence stated that "[n]one of the * * * ammunition components recovered at the [murder] scene could be associated with" any of several weapons, including the Wichita AR-15 rifle. See Pet. App. A117. By contrast, a February 1976 FBI laboratory report, which was also admitted into evidence at trial, "contained a finding that the .223 casing [found in the trunk of Coler's car] could be associated with the Wichita AR-15" (*United States* v. *Peltier,* 585 F.2d at 330).[5]

Finally, one of the AIM members who left Tent City on

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[5] The court of appeals explained the apparent disparity between the two reports by noting that the firearms expert testified that he did not examine the .223 cartridge casing that was found in Coler's car until December 1975 or January 1976 (*United States* v. *Peltier,* 585 F.2d at 330). Petitioner's trial counsel "declined to question [the expert] as to the reason for the apparent inconsistency" between the reports (*id.* at 333).

the night of the murders testified "that he overheard [petitioner and two others] discussing certain details of the murders on the evening of June 26, 1975" (*United States* v. *Peltier,* 585 F.2d at 320). Petitioner also made incriminating statements when he was apprehended several months later, telling the arresting officers that "two FBI agents were shot when they came to a house to serve a warrant on him" (Tr. 3405).

On direct appeal, the court of appeals affirmed petitioner's convictions, and this Court denied certiorari. *United States* v. *Peltier,* 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

2. In April 1982, petitioner filed a motion pursuant to 28 U.S.C. 2255 to vacate his convictions and for a new trial. Petitioner alleged that documents he had received under the Freedom of Information Act showed that the government knowingly presented false evidence at his trial and suppressed exculpatory evidence in violation of *Brady* v. *Maryland,* 373 U.S. 83 (1963).

Petitioner identified six separate categories of material that he contended was wrongfully withheld evidence. See *United States* v. *Peltier,* 553 F. Supp. 890, 894 (D.N.D. 1983), vacated and remanded, 731 F.2d 550 (8th Cir. 1984). One claim rested upon a newly discovered FBI teletype, dated October 2, 1975, which stated in part: " 'Recovered .223 caliber Colt rifle . . . contains different firing pin than that in rifle used' " in the murders. 553 F. Supp. at 895 (citation omitted); see also Pet. App. A113-A114. Petitioner alleged that the government's ballistics expert "testified that a conclusive firing pin comparison between the .223 * * * shell casing found in the trunk of Agent Coler's car, and the AR-15 rifle recovered from Wichita, Kansas, could not be performed due to the rifle's damaged condition, but that [the] newly discovered evidence indicates that a firing pin comparison between the rifle and the .223 casing was in fact performed and produced negative results" (553 F. Supp. at 895).

The district court found that petitioner had "misstated [the expert's] trial testimony"; the court noted that the expert had testified that he did not examine the casing found in Coler's car until late 1975 or early 1976 and that he " 'could not form a conclusion' " based on the firing pin as to whether that .223 casing had been fired by the AR-15 rifle (553 F. Supp. at 895, 896 (citation omitted)). The expert's conclusion that the casing had been fired by the Wichita AR-15 rifle rested not on the impression made by the firing pin, but on the expert's examination of the casing's extractor markings (*ibid.*).

The district court observed that the information in the teletype was similar to the information in the October 1975 laboratory report that was admitted into evidence, and that the two were "obviously related" (553 F. Supp. at 896). Like the October 1975 laboratory report, the teletype appeared on its face to be inconsistent with the expert's testimony and the February 1976 laboratory report (*ibid.*). The court observed, however, that the discrepancy between the October 1975 report and the February 1976 report had been placed before the jury, and could be explained by the fact that, as the expert testified, he did not begin examining the .223 caliber casing found in Agent Coler's trunk until December 1975 or January 1976, after the October 1975 report had been prepared (*id.* at 902-903). Because the related October 1975 teletype could be explained in the same way, the court found the teletype to be "merely cumulative" (*id.* at 903). The court therefore found no need to hold a hearing on petitioner's claim. The court went on to reject petitioner's contentions regarding the other categories of evidence and therefore denied petitioner's motion for a new trial. *Id.* at 896-903.

The court of appeals reversed the district court's determination and remanded for an evidentiary hearing with regard to the government's failure to disclose the FBI tele-

type (Pet. App. A94-A112).[6] The court observed that the cartridge casing found in the trunk of Agent Coler's car was an important part of the government's case against petitioner. It concluded that the teletype was subject to several possible interpretations. "For example, the use of the word 'different' [in the teletype] could indicate that the FBI knew the firing pin in the damaged AR-15 had been changed after the" murders (*id.* at A109). The court emphasized that "[f]urther investigation * * * may simply show that the use of the word 'different' in the teletype was an inaccurate way of expressing exactly what the October 31 laboratory report said—that the AR-15 could not be positively matched with any of the casings which had been tested at that time based on firing pin comparisons" (*id.* at A110). The court declined to "assume this resolution of the new discrepancy raised by the October 2, teletype without hard evidence one way or the other" (*ibid.*).

3. On remand, the district court heard testimony by FBI Agent Hodge, the expert who conducted the ballistics tests and authored the October 2 teletype. The district court subsequently entered detailed findings of fact and conclusions of law (Pet. App. A42-A79).

a. The court specifically found Agent Hodge to be a credible witness (Pet. App. A69-A70). Hodge testified that the evidence uncovered in the murder investigation was sent to his laboratory in three separate batches. The first batch, which Hodge received on July 5, 1975, included seven .223 caliber cartridge casings and a number of other items, but not the .223 caliber casing that was found in Agent Coler's car trunk (*id.* at A48, A51). When these items were received at the laboratory each was assigned an identification number ranging from Q1 to Q1102. Absent a special request, Hodge's practice was to examine evi-

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[6] The court of appeals upheld the district court's rejection of petitioner's other claims (Pet. App. A97-A98).

dence in numerical order by Q number. By August 5, he had examined items Q1 through Q219, a group that included the seven .223 casings. *Id.* at A43-A47.

On July 24, 1975, Hodge received the second batch of evidence, which included the cartridge casing found in the trunk of Agent Coler's car (Q2628). On September 12, he received the final group, which included the Wichita AR-15 rifle. Hodge subsequently placed the rifle's bolt on an FBI collection AR-15 and fired the weapon twice in order to create exemplars of the rifle's cartridge casings. Pet. App. A48-A51, A53.

The district court observed that "[b]ecause he had only examined items Q numbered 1 through 219 as of September 12, 1975, Hodge initially" compared the Wichita AR-15 exemplars to the seven .223 caliber bullet casings (Pet. App. A51). This examination resulted in a negative identification: "Hodge testified at the hearing that the firing pin in the Wichita AR-15 bolt was smooth, whereas the firing pin impression on the seven .223 casings he had tested had a cross imperfection and was very distinctive. It was on this basis Hodge could tell the firing pin in the gun that had fired these seven casings was different than the firing pin of the Wichita AR-15" (*id.* at A55). The October 2 teletype and the October 31 laboratory report summarized the results of this examination (*id.* at A55-A57).[7]

Hodge testified that it was not until much later—December 1975 or January 1976—that he examined the casing found in the trunk of Agent Coler's car. The district court stated (Pet. App. A58-A59) that Hodge

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[7] Hodge testified that the reference to the murder scene in the October 2 teletype "was a shorthand term by which Hodge meant to refer only to the Q numbers below Q# 219 listed in the August 5, 1975, lab report, which lab report was specifically referenced in the October 2 teletype." Pet. App. A55-A56; see also A60-A61 (discussing documents that corroborate this definition).

> was not able to reach either a positive or negative conclusion based upon a comparison of the firing pin impressions on [the casing] and the Wichita AR-15 exemplars, because he was not able to identify a sufficient number of characteristics in the firing pin impression left on the exemplars. The extractor marks on the [casing] and the Wichita AR-15 exemplars were very characteristic due to their depth and roughness, however, and Hodge was able to conclude the extractor marks on the [casing] had been made by the Wichita AR-15 to the exclusion of all other weapons.

Hodge made a total of 114 positive identifications of .223 bullet casings that had been fired by the AR-15. He reported these findings in his reports dated January 13, 1976, and February 10, 1976 (*ibid.*).

The district court rejected petitioner's contention that Hodge actually had examined the cartridge casing found in Agent Coler's trunk before sending the October 2 teletype. Petitioner claimed that Hodge had examined the casing on a priority basis as a result of either specific requests from the field or his own knowledge of the investigation. The court found that "Hodge never received a specific priority request to examine the .223 casing found in the trunk of Agent Coler's car * * *. Therefore it was examined in the ordinary course of his work" (Pet. App. A63). Hodge's knowledge of the investigation similarly "did not cause him to deviate from his general procedure of examining evidence numerically by Q number" (*id.* at A65).

b. Applying the relevant legal standard to these facts, the district court concluded that petitioner had "failed to establish constitutional error. * * * The record of the case * * * conclusively shows [petitioner] is entitled to no relief" (Pet. App. A79). The district court first observed that "[w]hether the government's nondisclosure [of *Brady* material] requires reversal depends upon the nature of the

material and the specificity of defense requests for disclosure" (*id.* at A72).

The court first found it "clear the October 2, 1975, teletype does not evince perjured testimony" (Pet. App. A75). Agent Hodge testified at trial that "he could not make a conclusive firing pin comparison between the Wichita AR-15 exemplars and the bullet casing found in the trunk of Agent Coler's car" (*id.* at A74). The teletype recited the results of comparisons between the exemplars and other casings, not a comparison between the exemplars and the casing found in Agent Coler's trunk; because the other casings carried an unusual mark not found on the exemplars, Agent Hodge concluded that they could not have been fired by the Wichita AR-15 (*id.* at A74-A75). Although the casing found in Agent Coler's car could not be identified on the basis of the firing pin impressions, "[t]he extractor marks left on both the Wichita AR-15 exemplars and [the casing] were very characteristic * * *, and therefore, it was possible for Hodge to conclude the extractor marks on [the casing] had been made by the Wichita AR-15 to the exclusion of all other weapons" (*id.* at A76).

The court also found that the teletype did not amount to material evidence within the meaning of *Brady* v. *Maryland, supra.* Thus, "the use of the word 'different' in the October 2, 1975, teletype was merely an inaccurate way of expressing what the October 31, 1975, laboratory report * * * was also meant to express—that the Wichita AR-15 could not be associated with any of the bullet casings that had been tested at that time based on firing pin comparisons" (Pet. App. A77). The teletype was therefore "merely cumulative" of information produced at trial because it had a meaning "identical" to that of the October 31, 1975, laboratory report that petitioner had introduced into evidence at trial (*id.* at A77-A78).

4. The court of appeals affirmed the district court's determination (Pet. App. A1-A28). It observed that this Court's decision in *United States* v. *Bagley,* 473 U.S. 667 (1985), addressed the government's failure to disclose evidence that could have been used to impeach government witnesses.[8] The court found that the government had withheld such evidence here, and stated that "[t]his case thus turns on the question whether the evidence withheld by the prosecution is material in the sense that its nondisclosure undermines confidence in the outcome of the trial" (Pet. App. A10). The court analyzed the relevance of the evidence to two issues—the link between the .223 cartridge casing found in Agent Coler's trunk and the Wichita AR-15 rifle; and the link between the Wichita rifle and petitioner.

The court stated that Agent Hodge's explanation of the apparent inconsistency between the October 31 laboratory report (which stated that no .223 casings had been linked to the AR-15 rifle) and the February 10 report (which reported that the .223 casing found in Coler's trunk had been tied to the rifle) was "facially inconsistent with the newly-discovered" teletype requesting Hodge to compare the AR-15 rifle with the .223 casings and Hodge's teletype reporting that the casings and rifle were not related (Pet. App. A14-A17).

The court concluded, however, that the jury "probably would not have acquitted" petitioner had it been aware of this evidence and had the defense been able to use the evidence to cross-examine Hodge (Pet. App. at A18). "When all is said and done," the court stated, "a few simple but important facts remain" (*id.* at A19). The .223 casing found in Agent Coler's car trunk "had in fact been extracted from the Wichita AR-15. This point was not

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[8] The district court had rendered its decision prior to this Court's decision in *Bagley*.

disputed" (*ibid.*). The court found no evidence that the casing was planted in the trunk by FBI agents or that a different casing was substituted for the one found in the trunk (*id.* at A20-A21).

Turning to the Wichita AR-15 rifle, the court rejected the government's contention that there was only one AR-15 rifle in the compound on the day of the shootings. It noted that 14 of the .223 cartridge casings discovered in the compound were not tied to the Wichita AR-15 rifle. Pet. App. A24-A25.

The court nonetheless found "several reasons" for "reservations as to whether the newly-discovered evidence probably would have caused the jury to reach a different result" (Pet. App. A25). First, Hodge testified at trial both that 14 casings did not match the Wichita AR-15 and that "he didn't know whether the fourteen had been extracted from the same weapon"; petitioner "failed to emphasize this point in his closing argument" (*ibid.*). Second, the court found it "unlikely that the fourteen casings were extracted from an AR-15 during the fire fight" with the FBI agents (*ibid.*). Third, two witnesses at trial testified that petitioner was carrying an AR-15 rifle and there was no testimony linking any other person to such a rifle (*id.* at A25-A27). The court stated that the newly discovered evidence might have led the jury to give "additional weight to the fact that there was more than one AR-15 on the compound on June 26" and that the jury "might have given more serious consideration to the possibility that an AR-15 other than the Wichita AR-15" was used to commit the murders, but that it was not "reasonably probable that [the jury] would have been sufficiently impressed by these possibilities to have reached a different result at trial" (*id.* at A27-A28 (footnote omitted)).

The court of appeals concluded its exhaustive review of petitioner's claim by stating that "[t]here is a *possibility* that the jury would have acquitted" petitioner if the newly

discovered evidence had been available to the defense (Pet. App. A28 (emphasis in original)). "Yet," the court stated, "we are bound by the *Bagley* test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury *probably* would have reached a different result. We have not been so convinced" (*ibid.* (emphasis in original)).

ARGUMENT

Petitioner claims that the court of appeals erred in applying this Court's decision in *United States* v. *Bagley*, 473 U.S. 667 (1985), to the particular facts of this case. While the facts relevant to petitioner's claim are complex, the materiality determination is not at all difficult: the October 2 teletype plainly was not material because all of the information contained in the teletype was available to petitioner and placed before the jury. In particular, the October 2 teletype revealed nothing more than the October 1975 report that was introduced into evidence at trial and Agent Hodge's trial testimony: that there were AR-15 shell casings at the murder scene that did not come from the Wichita AR-15, and that by October 1975, Agent Hodge had not yet determined that the shell casing found in Agent Coler's trunk came from the murder weapon.

1. This Court held in *Brady* v. *Maryland*, 373 U.S. 83 (1963), that the principles of due process require prosecutors to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial" (*Bagley*, 473 U.S. at 675). However, "a constitutional error occurs, and the conviction must be reversed, only if the [withheld] evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" (*id.* at 678). Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a proba-

bility sufficient to undermine confidence in the outcome." *Id.* at 682 (opinion of Blackmun, J.); accord, *id.* at 685 (White, J., concurring). Petitioner contends (Pet. 14-25) that, in view of the court of appeals' discussion of the significance of the withheld evidence, "it is utterly inconceivable that any court could legitimately and logically" conclude that the *Bagley* standard was not satisfied.[9]

The court of appeals found that the newly discovered evidence was relevant with respect to two issues: (1) whether the Wichita AR-15 discharged the cartridge that was found in the trunk of Agent Coler's car; and (2) whether there were other AR-15 rifles near the FBI agents at the time of the shootout. With respect to each issue, the

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[9] Petitioner's attack on the conclusion reached by the court of appeals is based in part on a mischaracterization of this Court's decision in *Bagley*. Petitioner states that "[c]onfidence in a verdict is undermined if 'there is a reasonable probability that . . . the result of the trial *might* have been different' " (Pet. 22-23 (citation omitted; emphasis added by petitioner)). Justice Blackmun's opinion states that there must be "a reasonable probability that * * * the result of the proceeding *would* have been different" (473 U.S. at 682 (emphasis added)), and Justice White agreed with that formulation (*id.* at 685). The "might have been different" standard obviously imposes a lesser burden on a defendant than a standard requiring a showing of a reasonable probability that the outcome of the trial "would" have been different.

Petitioner intimates (Pet. 21, 22) that the materiality analysis should take account of all intervening facts that might increase his chances of obtaining a different outcome at trial. Thus, he observes that he has been acquitted of one of the charges underlying the "other crimes" evidence introduced at his trial and that a second such charge was dismissed, and he contends that these facts are relevant in determining whether there is a reasonable probability of a different outcome. But the materiality inquiry looks to whether the newly discovered evidence would have changed the outcome of the *prior* trial; it does not provide an occasion for a general examination of all of the possible ways in which a *future* trial might be litigated in a manner more favorable to petitioner. All that is relevant is the effect of the newly discovered evidence on the prior proceeding.

court found that the withheld evidence would have been useful in cross-examining Agent Hodge. And it found a possibility that the jury would have reached a different result had the defense made use of this evidence. But the court concluded that, in view of the entire trial record, it was not reasonably probable that the jury would have acquitted petitioner if the newly discovered evidence had been disclosed. Pet. App. A17-A21, A25-A28.[10]

The court of appeals concluded that the enhanced potential for cross-examination of Hodge regarding the identification of the .223 casing did not give rise to a reasonable probability of a different verdict for the simple reason that such cross-examination would not by itself be sufficient to disprove the linkage between the Wichita AR-15 and the casing found in Agent Coler's trunk. In view of the complete absence of evidence contradicting the substance of Agent Hodge's identification, additional cross-examination simply would not have enabled petitioner to mount a credible challenge to Hodge's testimony that the casing found in the trunk had come from the Wichita AR-15. Pet. App. A19.[11] For that reason, the court correctly found no reasonable probability that the jury would reach a conclusion other than its apparent determination at trial—that the Wichita AR-15 was the murder weapon.

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[10] Petitioner asserts (Pet. 23-24) that the court of appeals believed that it was required to affirm the district court's denial of the motion for a new trial unless it found "virtually to a near certainty" that the withheld evidence would have resulted in an acquittal. The court of appeals applied no such standard. It repeatedly inquired whether the evidence created a "reasonable probability" that the jury would have reached a different result. See Pet. App. A18, A25, A27-A28.

[11] Even as impeachment evidence, the newly discovered evidence is quite weak. The district court found that Agent Hodge's explanation of the meaning of the October 1975 teletype and report was both credible and consistent with the other evidence adduced at trial. Pet. App. A50-A70, A75-A76.

With regard to the link between petitioner and the Wichita AR-15, the court of appeals found that the October 2 teletype supported the conclusion that other AR-15 rifles were used during the shootout, because it indicated that some of the .223 casings did not match the AR-15. But, as the court of appeals observed, Agent Hodge had testified at trial that 14 cartridge casings did not match the Wichita weapon. Thus, the new evidence is essentially cumulative of evidence that was available to petitioner and put before the jury. See Pet. App. A77-A78 (district court opinion).[12] The court further found that other evidence adduced at trial—the location at which the casings were found and eyewitness testimony that petitioner was the only person seen carrying an AR-15 before the agents were killed—indicated that it was "unlikely" that the casings not linked to the Wichita AR-15 were discharged during the gun battle that culminated in the agents' deaths (Pet. App. A23-A27). Because the newly discovered evidence thus has little impact upon the evidence linking petitioner to the murder weapon, the court of appeals was correct in finding no reasonable probability that the evidence would have altered the jury's verdict (*id.* at A27-A28).[13]

2. Petitioner contends (Pet. 25-35) that the court of appeals' interpretation of this Court's decision in *Bagley*

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[12] Petitioner himself states (Pet. 11 n.4) that the October 2 teletype was "amplified" by the October 31 laboratory report, which was disclosed to petitioner and introduced at trial.

[13] Petitioner asserts (Pet. 35-37) that the court of appeals erroneously applied a subjective standard in evaluating the effect of the newly discovered evidence on the outcome of the prior trial. Nothing in the court's decision supports that assertion. The court did refer to "the difficulties of putting ourselves in the position of the jury," but went on to "hold that it [*i.e.*, the jury] probably would not have acquitted him" (Pet. App. A18). The court consistently referred to the effect of the evidence upon the result that would have been reached by "the jury"; it simply did not substitute its own subjective view of the evidence. See, *e.g.*, Pet. App. A18, A21, A25, A27-A28.

conflicts with the interpretations of that decision adopted by other courts of appeals. Yet nothing in the language used by the court below or the analysis that it employed conflicts with the approach followed by any other court of appeals. The courts are, instead, uniform in their articulation of the *Bagley* standard. See, *e.g.*, *United States* v. *Petrillo*, No. 86-1412 (2d Cir. June 2, 1987), slip op. 3268, 3270-3271; *Barnes* v. *Lynaugh*, 817 F.2d 336, 339 (5th Cir. 1987); *Trujillo* v. *Sullivan*, 815 F.2d 597, 613-614 (10th Cir. 1987); *United States* v. *Kraemer*, 810 F.2d 173, 178 (8th Cir. 1987); *United States* v. *O'Dell*, 805 F.2d 637, 641-643 (6th Cir. 1986); *United States* v. *Brimberry*, 803 F.2d 908, 914-915 (7th Cir. 1986), cert. denied, No. 86-6253 (May 4, 1987); *United States* v. *Serna*, 799 F.2d 842, 848 (2d Cir. 1986), cert. denied, No. 86-1118 (Apr. 20, 1987); *United States* v. *McKellar*, 798 F.2d 151, 153-155 (5th Cir. 1986); *United States* v. *Pflaumer*, 774 F.2d 1224, 1226 (3d Cir. 1985), cert. denied, 475 U.S. 1046 (1986).

Petitioner attempts to illustrate the claimed conflict with a collection of excerpts from court of appeals decisions that are designed to show that these courts find withheld evidence to be material if it "raises a serious question as to the validity of the verdict" (Pet. 29). But there is no real difference between that standard and the "reasonable probability" test applied by the court below. Petitioner's "conflict" consists of nothing more than slightly differing verbal formulations that all express the same concept. He has not shown that there is any disagreement among the courts of appeals regarding the proper interpretation of the standard adopted by this Court in *Bagley*.[14]

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[14] Petitioner highlights portions of court of appeals opinions that use the words "might" or "may" in an attempt to create the impression that these courts have found the *Bagley* standard to be satisfied upon a showing that the withheld evidence "might" have resulted in a different trial outcome. In fact, each of these courts found, on the basis

3. Petitioner also claims (Pet. 37-45) that the court of appeals erred because it did not consider his specific requests for *Brady* material in evaluating the materiality of the newly discovered evidence. Five Justices agreed in *Bagley* that the fact that withheld evidence was covered by a specific request for documents made by the defendant does not alter the applicable materiality standard. See 473 U.S. at 682-683 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring). Justice Blackmun stated that the prosecutor's failure to respond to a specific request might have a more significant adverse effect on the preparation of the defendant's case than the failure to respond to a general request, because in that circumstance it is more reasonable for the defense "to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption" (*id.* at 682-683). Justice White declined to "elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure" (*id.* at 685). The most that can be said under *Bagley*, therefore, is that a failure to respond to a specific request should be given weight in the materiality inquiry where the prosecutor's action alters the defense strategy.

Here, petitioner has not shown that his strategic decisions at trial rested on the prosecutor's failure to disclose the newly discovered evidence. Nor could he, because the basic information contained in those documents was disclosed at trial and played no significant role in the defense

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of the unique facts before it, that there was a reasonable probability that the trial outcome *would* have been different. See *United States* v. *Severdija*, 790 F.2d 1556, 1560 (11th Cir. 1986); *Bagley* v. *Lumpkin*, 798 F.2d 1297, 1300, 1301-1302 (9th Cir. 1986); *United States* v. *Shaffer*, 789 F.2d 682, 689 (9th Cir. 1986) (evidence "would have discredited" crucial witness); *Lindsey* v. *King*, 769 F.2d 1034, 1043 (5th Cir. 1985); *United States ex rel. Smith* v. *Fairman*, 769 F.2d 386, 393 (7th Cir. 1985).

case (see Pet. App. A18-A19, A27 n.7).[15] Accordingly, this factor is not relevant to the materiality inquiry in the present case.

4. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court observed that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (427 U.S. at 103 (footnotes omitted)). Petitioner argues (Pet. 45-49) that the court of appeals erred because it failed to apply that standard here.

Petitioner is wrong for the simple reason that there was no finding that Agent Hodge's trial testimony was perjured. The district court specifically found that Agent Hodge was a credible witness and that the newly discovered evidence "does not evince perjured testimony" (Pet. App. A69-A70, A75). The district court actually endorsed Hodge's version of the events at issue here (*id.* at A50-A70). The court of appeals stated that Hodge's testimony at the post-trial evidentiary hearing was "facially inconsistent with the newly-discovered evidence," and indicated that the evidence might have some impeachment value, but the court never suggested that Hodge had committed perjury at trial. *Id.* at A14-A18; see also *id.* at A110 (in discussing possible interpretations of the October 2 teletype in its decision remanding the case for an evidentiary hearing, court of appeals did not "mean to imply that the October 2, teletype establishes that the motives or actions of any FBI agent or government prosecutor were improper").

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[15] The court of appeals noted (Pet. App. A18-A19) that petitioner's ability to exploit the October 1975 laboratory report was limited by an evidentiary ruling made by the district court. But that ruling was the result of the refusal by petitioner's attorney to question Hodge regarding the inconsistency between that report and the February 1976 report. See *United States* v. *Peltier*, 585 F.2d 314, 333-334 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

Petitioner cannot transform the court of appeals' conclusion that the newly discovered evidence might have been useful in discrediting Hodge's testimony into a determination that Hodge's trial testimony was perjured. Since there was in fact no finding of perjury, the court below properly declined to apply the *Agurs* materiality standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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